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NO. 81-2299

In the Supreme Court of the United States

OCTOBER TERM, 1981

HARRY'S HARDWARE, INC.
Petitioner

versus

JAMES C. PARSONS,
SUPERINTENDENT OF POLICE, ET AL

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a State Sunday Closing Law, without violating the Equal Protection Clause of the 14th Amendment, prohibit hardware stores from opening on Sundays and permit drug stores and groceries to be open on Sundays and to sell not only medicine and food but also most of the items constituting the stock in trade of hardware stores.

PARTIES TO THE PROCEEDING

1. Harry's Hardware, Inc., a Louisiana Corporation

2. James C. Parsons, former Superintendent of Police of the City of New Orleans

3. Harry Connick, District Attorney for the Parish of Orleans, State of Louisiana

4. William Guste, Attorney General, State of Louisiana

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28 U.S.C. 1257(3) 2

IN THE
SUPREME COURT OF THE UNITED STATES

NO.

HARRY'S HARDWARE, INC.
Petitioner

versus

JAMES C. PARSONS,
SUPERINTENDENT OF POLICE

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

The Petitioner, Harry's Hardware, Inc., petitions that a Writ of Certiorari be issued to review the opinion and judgment of the Supreme Court of Louisiana rendered in these proceedings.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court (Appendix "A", *infra*) is reported at 410 So. 2d 735. The reported decision indicates that petitioner's application for rehearing was denied on March 19, 1982. The opinion of the Court of Appeal, 4th Circuit, State of Louisiana (Appendix "B", *infra*) is reported at 399 So. 2d 632. The reasons for

judgment of the state trial court (Appendix "C", *infra*) are not reported.

JURISDICTION

(i) The decision of the Supreme Court of Louisiana here sought to be reviewed was rendered on January 25, 1982.

(ii) The order of the Supreme Court of Louisiana denying petitioner's request for a rehearing was rendered on March 19, 1982.

(iii) The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1257(3).

STATUTES IN QUESTION

Louisiana Revised Statutes, LSA-RS 51:191, 192 and 194 (Appendix "D", *infra*).

STATEMENT OF THE CASE

Petitioner, Harry's Hardware, Inc., operates several large hardware stores in the City of New Orleans. In its stores, petitioner sells a wide range of merchandise ranging from light bulbs to swimming pool chemicals, from lawn care products to watches, from pots and pans to tools including paper goods, cleaning supplies, kitchen products, as well as the more standard hardware items. Petitioner's chief competitors are the large chain drug stores operating in

New Orleans, and, to a lesser extent, the large chain grocery stores. Petitioner contends that the large drug stores sell essentially the identical merchandise which is sold by petitioner except that petitioner does not sell drugs and medicine. Similarly, most of the non-food items carried by grocery stores are also sold by petitioner. Petitioner does not sell food.

Section 191 of Title 51 of the Louisiana Revised Statutes (Appendix "D"), originally enacted in 1886, requires all businesses in Louisiana to be closed from midnight Saturday to midnight Sunday, but Section 192 of said title exempts drug stores and "public and private markets" from the effects of Section 191. Consequently, the large chain drug stores who are petitioner's direct competitors are permitted, by Louisiana law, to be open on Sundays. Petitioner, not being exempt from the Louisiana Sunday Closing Law, is forced to close on Sundays. Section 194 of Title 51 of the Louisiana Revised Statutes (Appendix "D") adopted in 1962, establishes a narrow list of merchandise which exempt stores are prohibited from selling. Rather than restricting exempt stores to the merchandise giving rise to the exemption, *e.g.* drugs and food, the Louisiana statute permits an exempt business to sell its entire stock of merchandise with the exception of the specific items listed in Section 194. This leads to the result that in Louisiana, on Sundays, hardware, which is not a prohibited item, may be lawfully sold by drug stores or grocery stores, but not by hardware stores. The result is that petitioner loses a substantial portion of its market share by being forced to close on Sundays while its competitors, the large drug and grocery stores, are per-

mitted to be open and to sell the identical merchandise carried by petitioner.

Alleging that this Louisiana statutory scheme deprives it of the Equal Protection of the Laws guaranteed by the 14th Amendement to the United States Constitution, petitioner brought this action to enjoin the enforcement of the Louisiana Sunday Closing Laws against petitioner. The case was tried on affidavits. The affidavits submitted by petitioner support petitioner's contention that in the three to five mile trading area of each of petitioner's locations there are a total of 16 major drug and grocery stores which carry the same merchandise as plaintiff, that in one instance such a drug store is directly across the street from one of petitioner's stores, and that all of these competitors of petitioner are open for business on Sundays. (Opinion intermediate Court of Appeal, Appendix "B", p. B-14) The only affidavit submitted by respondents was an affidavit by the Superintendent of Police of the City of New Orleans to the effect that he is enforcing and will continue to enforce the Sunday Closing Laws.

The trial court dismissed petitioner's action, considering itself bound to the latest previous expression of the Louisiana Supreme Court with reference to Sunday Closing Laws, *State v. Scallon*, 374 So. 2d 1232 (La. 1979). On appeal to the Louisiana Court of Appeal for the Fourth Circuit, the trial court was reversed and the issuance of an injunction ordered, the Court holding that petitioner is in a business similarly situated to groceries and drug stores and that, to

permit drug stores and grocery stores to be open on Sundays and sell their non-drug and non-food stock while hardware stores carrying the same and/or similar merchandise are required to be closed, constitutes invidious discrimination against hardware stores and that, for this reasons, the Louisiana Sunday Closing Law is unconstitutional.

On appeal to the Louisiana Supreme Court by the respondents, that Court by a four to three decision reversed the intermediate Court of Appeal and dismissed petitioner's action, holding that the discrimination of the Louisiana Sunday Closing Laws against hardware stores is the result of rational legislative scheme, and that this discrimination against hardware stores is not rendered unconstitutional because of the fact that drug stores and grocery stores are permitted to sell non-drug and non-food items on Sundays. Three justices dissented, and two separate dissenting opinions were filed.

HOW FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

In its petition filed in the State Trial Court, petitioner alleged the following:

> 15.
>
> "Petitioner avers that the Sunday Closing Law invidiously discriminates between persons and corporations in the same business namely the hardware, home center and garden center business

> by permitting certain companies to open its stores on Sundays while requiring others, such as petitioner, to keep its stores closed, all of which deprives petitioner of the equal protection of the law, in violation of its rights under the Constitution of the United States and of the State of Louisiana."

The Trial Court held (Appendix "C", *infra*):

> "the Court is unable to find that the facts, as stated — the law written — and any inequities which do exist — are sufficient to declare the Act unconstitutional, especially based upon the jurisprudence as it now exists."

The intermediate Court of Appeal declared the Louisiana Sunday Closing Law to be unconstitutional (Appendix "B", *infra*), stating:

> "The Constitution of the United States, while forbidding the State from engaging in discrimination where that discrimination is invidious, does not require that a statutory discrimination be set aside if any state of facts reasonably may be conceived to support it. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.
>
> The distinction between hardware stores and grocery/drugstores is arbitrary and without any relation to public health, recreation and welfare. If the pur-

> pose of the statute is prevention of unfair competition, then that purpose has failed in reality....
>
> We hold that LA. R.S. 51:194, the Sunday Closing Law, is manifestly unconstitutional and that a permanent injunction should issue as prayed for. For the foregoing reasons the judgment of the District Court is reversed and set aside and this matter is remanded for issuance of the permanent injunction in accordance with the views hereinabove expressed. All costs are to be paid by appellees."

By a 4:3 majority, the Supreme Court of Louisiana overruled the intermediate State Appellate Court, (Appendix "A", *infra*), holding that:

> " Each of the exemptions provided by the Sunday Closing Law is rationally related to the State's objective in enacting such a statute. The discrimination suffered by the plaintiff's hardware stores is a by-product of a rational legislative scheme whereby the leisure and recreation of the populace is fostered without concomitant deprivation of access to essentials such as food and medicine. This discrimination does not become invidious merely because those drug and grocery stores which are allowed to remain open may also sell non-food and non-drug items."

ARGUMENT

In deciding that the Louisiana Sunday Closing Law may without violating the Equal Protection Clause of the 14th Amendment to the United States Constitution, require a hardware store to close on Sundays while permitting drug stores and grocery stores to sell hardware on Sundays, the Louisiana Supreme Court conflicts with the decisions of several other state courts of last resort. *Shag-Way Department Stores Inc., v. City of Omaha*, 179 Neb. 707, 140 N.W. 2d 28 (Neb. 1966), *Allen v. City of Colorado Springs*, 75 P. 2d 141 (Colo. 1938), *Hughes v. Reynolds* 223 Ga. 727, 157 S.E. 2d 746 (Ga. 1967).[1]

These cases all stand for the proposition that, in order for classifications in Sunday Closing laws to be valid, exempt stores may not be permitted to sell on Sundays the stock in trade of non-exempt stores.

In *Shag-Way*, the Nebraska Sunday Closing Law was held to be unconstitutional because it prohibited Sunday sales of clothing and food only by such stores from which

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[1] Many other states have held their Sunday closing laws to be unconstitutional. The latest such decision is that of the Supreme Court of Arkansas in *Handy Dan Improvements Center v. Adams*, _____ S.W. 24 _____ (Ark. 1982). Other such decisions have been listed in *Caldor's Inc. v. Bedding Barn, Inc.* 177 Conn. 304, 417 A.2d 343 (1979) which invalidated the Connecticut statute. These cases differ from the instant case because they all deal with Sunday closing legislation which contains lists of *commodities*, prohibited or exempt. The Louisiana scheme, to the contrary is based on prohibited and exempt *purveyors*.

such goods are ordinarily sold as the main business but permitted Sunday sales of clothing and food by other establishments.

Allen invalidated a Sunday Closing ordinance in Colorado Springs. Like the Louisiana statute here attacked, the ordinance required all stores to be closed on Sundays, exempted drug stores from the operation of the ordinance and permitted drug stores on Sundays to sell not only drugs but their entire inventory of general merchandise. Commenting that the ordinance created a condition whereby drug stores could lawfully sell groceries on Sundays while groceries were prohibited from doing so, it held the ordinance to be violative of the Equal Protection Clause.

Hughes invalidated a Georgia Sunday Closing Law which prohibited the sale of certain commodities on Sundays but permitted prohibited commodities to be sold in stores whose dollar volume of sales of prohibited merchandise was less than 50% of their total sales volume. Stating that this provision permits a store selling a variety of goods to sell an item of furniture on Sundays, but prohibits a furniture store from doing the same, the Georgia Court held its State's Sunday Closing Law to violate the 14th Amendment.

In contrast to the foregoing decisions of the Supreme Court of Colorado, Nebraska and Georgia, the majority opinion of the Louisiana Supreme Court approves a legislative scheme where "hardware" may be sold on Sundays by

drug stores but not by hardware stores and states that the discrimination created by the Louisiana Statute in favor of drug stores and grocery stores and against hardware stores does not become invidious "merely because those drug and grocery stores which are allowed to remain open may also sell non-food and non-drug items."[2] (Appendix "A", p. A-6)

The constitutionality of classificiations in Sunday Closing Laws under the 14th Amendment was analyzed in depth by this Honorable Court in *McGowan v. Maryland* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961). This Court held that to offend the Equal Protection Clause, classifications must rest on grounds wholly irrelevant to the achievement of the State's objective. Applying this rule to the facts of *McGowan*, this Court approved a statutory arrangement which permitted operators of bathing beaches and amusement parks to sell on Sundays merchandise customarily sold in such establishments — all other merchants being prohibited from selling such (and any other) merchandise. This Court approved the statutory scheme, holding that:

> "a legislature could reasonably find that these commodities, necessary for the health and recreation of its citizens, should only be sold on Sunday by those

[2] The writer of the opinion is in error in implying that only certain drug stores and food stores are exempt from the operation of the Louisiana act. All drug stores are specifically exempt. Grocery stores are exempt as "public and private markets." *State v. Penniman*, 224 La. 95, 68 So. 2d 770 (La. 1954). LSA-R.S. 51:192.

> vendors at the locations where the commodities are most likely to be immediately put to use." 366 U.S. 428.

In the instant case, in contrast to *McGowan*, there is no geographical distinction between the stores that are required to close under Louisiana law and those permitted to remain open. They are all located in the City of New Orleans, and none of the privileged stores possess recreational location attributes such as were found in *McGowan*. Yet, one set of stores is permitted to sell their full range of merchandise (other than the narrow list of prohibited goods under Section 194) and the other set of stores is required to be closed. A 4:3 majority of the Louisiana Supreme Court justifies this discrimination as:

> "the by-product of a rational legislative scheme whereby the leisure and recreation of the populace is fostered without concomitant deprivation of access to essentials such as food and medicine. This discrimination does not become invidious merely because those drug and grocery stores which are allowed to remain open may also sell non-food and non-drug items." (Appendix "A", p. A-6)

There is no evidence in the record to the effect that food and drugs would not be available on Sundays in Louisiana if food stores and drug stores were restricted in their Sunday sales to food and drugs. In his dissenting opinion, Justice Watson aptly summarized the discriminatory

and monopoly fostering effects of the Louisiana statutory scheme on petitioner as follows:

> "Hardware accounts for only 18% of plaintiff's sales. A large volume of its business is in home and garden supplies. Almost every item sold by Harry's Hardware, Inc., is also offered by grocery and drug stores in the New Orleans area. Apart from food and medicine, the stores all sell essentially the same merchandise. The employees of Harry's Hardware made Sunday purchases of eighty-two different items which are also carried in their stock. Walgreens Drug Store offered for sale in a Sunday advertisement at least forty-three items which are carried in stock at Harry's Hardware, Inc. Because drug stores and grocery stores are allowed to open on Sundays and Harry's is not, Harry's has a distinct competitive disadvantage. On a given Sunday, one Harry's Hardware store sold $3,800 worth of merchandise which would allegedly have been permanently lost to neighboring establishments had the store been closed." (Appendix "A", p. A-8)

The Louisiana statutory scheme, thus, is greatly different from the Maryland scheme approved in *McGowan*. In Maryland, the criterion chosen to decide which stores would be exempt from the Sunday Closing requirement was a geographical one: stores located at bathing beaches, bathhouses, amusement parks and dancing saloons were permitted to sell "any merchandise essential to or customarily sold

at or incidental to" such locations. (366 U.S. 454). In Louisiana, by contrast, a drug store irrespective of its location is exempt from the Sunday laws (LSA-R.S. 51:192) and, being exempt may sell on Sundays its (and petitioner's) stock in trade with the exception only of clothing, lumber, building supply materials, furniture, home, business or office furniture, appliances, automobiles or motor vehicle parts. (LSA-R.S. 51:194A). Hardware and tools are not prohibited items, ncr is the majority of the inventory of petitioner.

The recited legislative purpose of the Louisiana statute is to "promote the health, recreation and welfare of the people of this state and to prevent unfair competition among persons, firms or business establishments" (LSA-R.S. 51:194C). Far from achieving this purpose, the Louisiana law has been instrumental in creating Sunday monopolies. The distinction made by the Louisiana statutory scheme between hardware stores and drug stores resulting in the forced closing of the former on Sunday while the latter enjoy a monopoly position does indeed rest on grounds wholly irrelevant to the achievement of the State's objective.

CONCLUSION

Louisiana has adopted a Sunday closing scheme which is unique. Rather than providing for the exemption of specific commodities, it provides for exemption of specific purveyors. These exempt purveyors are not limited in their sales to the goods giving rise to the exemption, *e.g* drugs

and food. This scheme varies significantly from the one upheld in *McGowan*. It is submitted that the Louisiana scheme is utterly incompatible with the equal protection clause of the 14th Amendment to the U.S. Constitution. Accordingly, it is respectfully submitted that a writ of certiorari be issued herein to the Supreme Court of Louisiana.

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CERTIFICATE OF SERVICE

I, Rene Lehmann, hereby certify that I have on June _____, 1982, by United States Mail, postage prepaid, served three copies of the foregoing petition upon all parties required to be served, their names and addresses being as follows:

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